Office - Supreme Court, U.S.
FILED
OCT 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-308

In the Supreme Court of the United States

OCTOBER TERM, 1982

DELPRO COMPANY, PETITIONER

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Brotherhood of Railway Clerks v. *Florida E.C. Ry.*, 384 U.S. 238 5

Despatch Shops, Inc. v. *Railroad Retirement Board*, 153 F.2d 644 ..... 5, 6

Detroit & T.S.L.R.R. v. *United Transportation Union*, 396 U.S. 142 5

Pan American World Airways, Inc. v. *United Brotherhood of Carpenters*, 324 F.2d 217 3

Railroad Retirement Board v. *Duquesne Warehouse Co.*, 326 U.S. 446 3

United States v. *Feaster*, 410 F.2d 1354, cert. denied, 396 U.S. 962 5

United Transportation Union v. *Long Island R.R.*, No. 80-1925 (Mar. 24, 1982) 5

Virginian Ry. v. *System Federation No. 40*, 300 U.S. 515 5

Statute:

Railway Labor Act, 45 U.S.C. 151 *et seq.* 2, 3, 5, 6

45 U.S.C. 151 First 1, 2
45 U.S.C. 151a 5
45 U.S.C. 152 Ninth 1

Page

Miscellaneous:

Railway Labor Act Amendments: Hearings on H.R. 7650 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934) 5

S. 3266, 73d Cong., 2d Sess. (1934) 3-4

To Amend the Railway Labor Act: Hearings on S. 3266 Before the Senate Comm. on Interstate Commerce, 73d Cong., 2d Sess. (1934) 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-308

DELPRO COMPANY, PETITIONER

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner, a railcar repair company that is indirectly owned by a group of railroad carriers, contends that it is not subject to the jurisdiction of the National Mediation Board pursuant to 45 U.S.C. 151 First.

1. On August 20, 1980, the Brotherhood Railway Carmen of the United States and Canada, AFL-CIO, filed an application with the National Mediation Board pursuant to the Railway Labor Act ("RLA"), 45 U.S.C. 152 Ninth, asserting the existence of a representation dispute involving approximately 135 "carmen-mechanics" employed by petitioner Delpro Company. Petitioner is engaged in the repair of railcars and is indirectly owned by a consortium of 30 railroads. Pursuant to its statutory mandate, the Board routinely investigated the matter and determined that petitioner is a "carrier" subject to its jurisdiction within the

meaning of 45 U.S.C. 151 First (Pet. App. A-21 to A-27). On petitioner's application for reconsideration, the Board reaffirmed its earlier determination of jurisdiction (*id.* at A-28 to A-33). Subsequently, on December 17, 1980, an election was held and the overwhelming majority of eligible employees voted for representation by the union (*id.* at A-34 to A-35).

Petitioner filed this action for declaratory and injunctive relief in the United States District Court for the District of Delaware, challenging the Board's determination of jurisdiction. The district court held that the Board properly exercised jurisdiction over petitioner (Pet. App. A-36 to A-48; 519 F. Supp. 842). The court of appeals affirmed (Pet. App. A-3 to A-13; 676 F.2d 960), concluding that "inasmuch as maintenance workers employed directly by a carrier would unquestionably be covered by the Railway Labor Act, so also should those workers employed by a subsidiary such as [petitioner] that is indirectly owned by a group of carriers" (Pet. App. A-12).

2. The decision of the court of appeals is correct, does not conflict with the decision of any other court and does not warrant review.

a. Petitioner contends (Pet. 10-11) that the court of appeals' decision is contrary to the plain language of the statute. This contention is insubstantial.

The statute, 45 U.S.C. 151 First, provides that the term "carrier" includes

> any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation,

> receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad * * *.

Petitioner argues (Pet. 11; emphasis in original) that it does not fall within this definition because "[t]he repair and maintenance which Delpro performs do *not* in any manner directly involve any 'property transported by railroad.' " But the statute by its express terms covers any railroad subsidiary that "performs *any service* * * * *in connection with the transportation*" of property by railroad. As the court of appeals correctly concluded (Pet. App. A-11 to A-12), the repair and maintenance of railroad cars clearly is a service connected with the transportation of goods by railroad. Contrary to petitioner's contention, the statute does not require that a carrier be "directly involve[d]" with the property transported by railroad. The statute's broad language reflects Congress' intent to ensure that entities such as petitioner would be covered by the RLA. See *Pan American World Airways, Inc.* v. *United Brotherhood of Carpenters*, 324 F.2d 217, 220 (9th Cir. 1963). Cf. *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 326 U.S. 446, 454 (1946).

b. Petitioner's reliance (Pet. 12-16) on the legislative history of the RLA amendments is unavailing.[1] As introduced in the Senate, the pertinent amendment to the RLA would have defined "carrier" as including "any company operating any equipment or facilities or furnishing any service included within the definition of the terms 'railroad' and 'transportation' as defined in the Interstate Commerce

---

[1] Petitioner's resort in this Court to the legislative history of the Act is ironic because in its petition for rehearing en banc in the court of appeals (Pet. for Reh'g 3), petitioner argued that the panel erred in relying on "legislative intent or extraneous aids" in construing the plain language of the statute.

Act." S. 3266, 73d Cong., 2d Sess., § 1 First (1934). In his testimony before the Senate Committee on Interstate Commerce, Joseph Eastman, the Federal Coordinator of Transportation, described the proposed definition of "carrier" in the Senate bill as

> intended to bring within the scope of the act operations which form an *integral part of railroad transportation,* but which are performed by companies which are not now subject to the Railway Labor Act. * * * [For example,] the companies to which railroads have on occasion *contracted out their maintenance work on equipment* and even on way and structures. The thought is that concerns which function in this way as an *integral part of the railroad transportation system* should be subject to the same duties and obligations with respect to labor controversies as the railroads themselves * * *.

To Amend the Railway Labor Act: Hearings on S. 3266 Before the Senate Comm. on Interstate Commerce, 73d Cong., 2d Sess. 10 (1934) (emphasis supplied) ("*Senate Hearings*"). The Committee Chairman suggested that the definition should be redrafted so as not to incorporate by reference definitions in another statute. *Id.* at 11. In addition, a railroad representative objected to the term "any company" as possibly including independent contractors hired to build bridges, construct new lines or new railroad stations. *Id.* at 56-58 (testimony of M.W. Clement). Mr. Clement distinguished between routine maintenance work, ordinarily handled by railroad maintenance workers, and major construction projects, which he viewed as outside the railroad field. *Ibid.*

In response to these comments, Mr. Eastman redrafted the definition section of the bill to eliminate outside companies engaged in construction work for railroads. *Senate Hearings, supra,* at 145. In addition, Mr. Eastman stated

that the new draft, which subsequently was enacted without pertinent changes, limited the definition to "carriers and their subsidiaries engaged in transportation." *Ibid.* See *Railway Labor Act Amendments: Hearings on H.R. 7650 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 18 (1934). There is nothing in this history that suggests that the definition of "carrier" in the RLA was intended to exclude railroad subsidiaries that are engaged in the repair and maintenance of railroad cars and equipment, a service that Mr. Eastman described as "an integral part of the railroad transportation system." *Senate Hearings, supra*, at 10. Indeed, as one court has observed in this connection, "[i]t is difficult to conceive of any supporting activity that is more inherent or vital to the sustained functioning of a railroad system than the repair and construction of its rolling stock." *Despatch Shops, Inc.* v. *Railroad Retirement Board*, 153 F.2d 644, 646 (D.C. Cir. 1946). Cf. *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 554-556 (1937); *United States* v. *Feaster*, 410 F.2d 1354, 1371 (5th Cir.), cert. denied, 396 U.S. 962 (1969).

c. Petitioner's suggestion (Pet. 17-20) that the decision below is inconsistent with the congressional purpose underlying the RLA is mistaken. Congress enacted the RLA out of its concern to avoid disruptions of vital interstate rail transportation. See 45 U.S.C. 151a. Through the RLA and the National Mediation Board, Congress established a specially tailored labor relations framework that is believed to be "the most effective means of preventing such disruptions * * *." *United Transportation Union* v. *Long Island R.R.*, No. 80-1925 (Mar. 24, 1982), slip op. 10. See also *Detroit & T.S.L.R.R.* v. *United Transportation Union*, 396 U.S. 142, 148-149 (1969); *Brotherhood of Railway Clerks* v. *Florida E.C. Ry.* 384 U.S. 238, 246 (1966).

It is uncontroverted that petitioner and its parent corporation, Trailer Train Company, are part of an elaborate subsidiarization scheme involving more than two dozen of the largest railroads in the nation (see Pet. App. A-37 to A-39). If a subsidiary like petitioner is not regarded as a "carrier" under the RLA, then railroads could easily insulate their various support services from the special labor protections of the RLA "through the simple expedient of setting up wholly owned corporate affiliates to perform these services. It is conceivable that everything from maintenance-of-way through engineering or bookkeeping might be done by so called 'independent' corporations." *Despatch Shops, Inc.* v. *Railroad Retirement Board, supra,* 153 F.2d at 646. This result clearly would thwart the goal that Congress sought to achieve in enacting the RLA.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1982

DOJ-1982-10